In The

Supreme Court of the United States

October Term, 1978

No. 78-5066

IRVING JEROME DUNAWAY,

Petitioner,

v.

STATE OF NEW YORK,

Respondent.

On Writ Of Certiorari To The New York State Supreme Court, Appellate Division, Fourth Judicial Department

BRIEF FOR RESPONDENT

LAWRENCE T. KURLANDER
District Attorney of Monroe County
201 Hall of Justice
Rochester, New York 14614

Attorney for Respondent

Kenneth R. Fisher,
Jeffrey F. Chamberlain,
Melvin Bressler,
of Counsel

Daily Record Corporation
Rochester, New York

(4572)

Spaulding Law Printing
Syracuse, New York

TABLE OF CONTENTS

TABLE OF AUTHORITIES

In The

Supreme Court of the United States

October Term, 1978

No. 78-5066

IRVING JEROME DUNAWAY,

Petitioner,

v.

STATE OF NEW YORK,

Respondent.

On Writ Of Certiorari To The New York State Supreme Court, Appellate Division, Fourth Judicial Department

---

BRIEF FOR RESPONDENT

We adopt the preliminary matters in the Petitioner's brief titled: Opinions Below; Jurisdiction; Constitutional Provisions Involved.

Questions Presented

1. Was Dunaway seized, in the Fourth Amendment sense, when he agreed to go downtown for questioning.
2. If Dunaway was seized, was the seizure reasonable under all the circumstances.
3. Did the police conduct sufficiently taint the voluntary confession and render it excludable as the "fruit of the poisonous tree."

4. Should the exclusionary rule be invoked to deter the conduct of the police which was in good faith reliance on existing New York law.

Statement of the Case

Philip Argento (with his family) ran a small pizza restaurant in Rochester, New York. On Friday, March 26, 1971, business was slow, and Mr. Argento and his wife were alone in the store (T.M. 273). At about 10:00 p.m., two men came in, one with a gun under his arm. It was a sawed-off, double-barreled .12 gauge shotgun, wrapped with tape (T.M. 217, 275). The man with the gun shouted an obscenity at Carmailee Argento, who backed through the doorway into the kitchen to get her husband (T.M. 276).* One of the men went toward the cash register. The other man pointed the gun directly at both Mr. and Mrs. Argento from the kitchen doorway (T.M. 277). Mr. Argento, who was making pizza, stepped forward to see what was happening, and as he did he was shot in the head from a distance of inches (T.M. 278). Mr. Argento fell backwards and landed face down on the floor (T.M. 172). The left side of his head had been blown right off (T.M. 173, 316). Mrs. Argento did not see either of the men leave. She was looking at her husband (T.M. 278).

The Rochester Police Department conducted a thorough investigation of this murder. They were at the scene moments after the killing, secured the area and began interviewing prospective witnesses immediately. But the investigation was at a stalemate until August, when the police "got a break in the case." (T.M. 240, 242-43, 280).

On August 10, Detective Robert Mickelson spoke with one of his informants, O. J. Sparrow. Sparrow said that he had recently

*Mr. and Mrs. Argento lived in an apartment behind the restaurant with their daughter and Mr. Argento's mother. His brother lived across the street (T.M. 271).

been in jail and had heard about two men who might know about the shooting. One was James Cole. He did not know the other's last name, but his first name was Irving. Immediately after speaking with Sparrow, Mickelson called Detective Anthony Fantigrossi, who was in charge of the investigation. Fantigrossi had been at home, but came to his office immediately, interrogated Sparrow at length, and confirmed the information Sparrow had given Mickelson (A. 55). Sparrow knew what Irving looked like and identified his picture from a file of photographs. The picture was petitioner's, Irving Dunaway (A. 51, 53).

James Cole had indeed been in jail with Sparrow, and was still there. Fantigrossi interviewed him, and Cole convinced him that he, Cole, had nothing to do with the shooting (A. 52). But he did know something about it, and implicated Ronald Wallace Johnson, also known as Ba-Ba Adams. Johnson is the person who fired the shot that killed Philip Argento (A. 53). Cole also confirmed petitioner's involvement in the crime, even supplying his nickname, "Axelrod." Cole had received this information from Hubert Adams, who, he said, was Johnson's brother (A. 52-53).

Hubert Adams was in Elmira Correctional Facility (about 120 miles away) at the time, sentenced on another crime (A. 53, 58). Johnson was a juvenile (A. 56). Dunaway, the police learned, was in Rochester. Fantigrossi decided to try to talk with Dunaway.

About eight the next morning, Detectives Mickelson, Ruvio and Luciano went to Dunaway's house. Two of them knocked on the door and asked for him, but he was not home. While this was happening, Detective Luciano, waiting outside, had seen a young girl leave Dunaway's house and go to one about three houses away. Luciano had said "good morning" to her as she passed (A. 73). When Mickelson returned (Ruvio had stayed behind to make a telephone call), he and Luciano went to that house. Luciano stayed in the driveway while Mickelson knocked on the door.* A

*No one went inside (A. 76, 89).

man answered. Mickelson identified himself and asked if he was Axelrod Dunaway. The man said he was. Mickelson told him that the police wanted to talk to him and would he come downtown. Dunaway said yes, he would (T.M. 247, A. 89, 90). The girl Luciano had seen was Dunaway's sister. She had told Dunaway that the police were at his house and wanted to question him. Dunaway was on his way to speak with the police when Mickelson knocked on the door (A. 32, 87).

Mickelson motioned to Luciano and they all walked back to the car, an unmarked sedan. Dunaway did not try to run away. The officers did not abuse Mr. Dunaway (A. 64, 67, 78, 90, 99, 101, 102).*

The ride downtown took approximately 30 minutes. On the way, Dunaway asked why he had to go downtown to be questioned. The detectives told him to wait and it would be explained when they got there. Dunaway did not object. There was no other conversation in the car (A. 81, 85).

They went to the Detective Bureau on the fourth floor of the Public Safety Building (A. 33). Dunaway met with Detective Francis Novitskey. Novitskey asked Dunaway his name and age (T.M. 300). He told him the police were investigating the homicide on Genesee Street (T.M. 282) and asked if Dunaway knew anything about it (T.M. 300). Dunaway said yes, and Novitskey then advised him of his Miranda rights.** Dunaway agreed to speak with the police about the shooting, implicating

*Dunaway claimed that the police touched him on the arm and grabbed him by the belt of his pants (A. 32, T.M. 390). The record is replete with examples of Dunaway deliberately making inaccurate and self-serving statements to the police. Many of these examples are admitted in the defendant's own testimony (*e.g.*, T.M. 393). Others were disbelieved by the trial court and Jury (T.M. 395, 554).

**Novitskey said that Dunaway's answer did not yet implicate him in the killing, "not to my satisfaction at that time, no." (T.M. 301). Novitskey did not formally arrest Dunaway until later.

himself in the crime. At about 10:20 a.m., Dunaway repeated his statement to a stenographer. That lasted about 25 minutes. He was then booked and formally charged (A. 6, 9, 10).

At about 10:00 p.m. that same evening, Dunaway asked to see Detective Novitskey again (A. 10, 22, 24). He told Novitskey that he wanted to "come clean and tell the whole truth." (A. 10). He was again advised of his Miranda rights (A. 24, 25, 10). He gave the police a further statement about his involvement in the crime. The conversation was very brief (A.25).

The police met with Dunaway the following morning. They again confirmed his understanding of his Miranda rights (A. 25). Dunaway repeated his expanded statement of the night before and it was recorded by a stenographer.

These statements were determined to be voluntary at a pretrial suppression hearing. The "first" statement, and evidence developed from it, were used against the defendant at trial. The later statement was not used at trial because of redaction problems. *Bruton v. United States*, 391 U.S. 123 (1968).

Summary of Argument

Petitioner claims that he was illegally "seized" and that his statements to the police, while concededly voluntary*, were nonetheless improperly admitted in evidence at his trial. Of course, the admissibility question arises only if the Court finds that Dunaway's Fourth Amendment freedoms were impermissibly diminished by the Rochester Police Department.

Resolution of this case requires determination of the nature of Dunaway's initial contact with the police on August 11, 1971. There appear to be only three options: (1) Dunaway was not "seized" at all; (2) or he was legally detained; (3) or he was unreasonably seized in violation of the Fourth Amendment.

We believe that the credible evidence in this case shows that Dunaway voluntarily consented to speak with the police on August 11, 1971. We also believe that the police were entitled to talk to Dunaway in their careful and good faith effort to solve a serious and baffling crime. Indeed, we submit that failure to have done so would have been gross incompetence by the police. Finally, we believe that the evidence obtained from and through Dunaway was properly admitted at trial: Dunaway's statements to the police were "sufficiently . . . act[s] of free will to purge the primary taint of any initial Fourth Amendment violation. *Wong Sun v. United States*, 371 U.S. 471, 486 (1963); *Brown v. Illinois*, 422 U.S. 590, 602 (1975).

*There are no Fifth or Sixth Amendment issues on this appeal.

POINT ONE

Dunaway was not "seized" when he agreed to accompany the officers downtown.

"Obviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons." *Terry v. Ohio*, 392 U.S. 1, 19, n. 16 (1968). There is no constitutional prohibition barring the police from questioning a person who voluntarily agrees to speak with them. In fact, citizens are encouraged to cooperate voluntarily with police investigations. See, *e.g.*, *Terry v. Ohio*, *supra*, 392 U.S. at 11. See also, Point II, *infra*. To constitute a seizure cognizable by the Fourth Amendment, a person must be detained by the police against his will. *Cupp v. Murphy*, 412 U.S. 291, 294 (1973).

Historically, detention within the contemplation of the Fourth Amendment has been viewed as a consequence not simply of particular police conduct but also of its expectable impact on the mind of the person detained. See, *e.g.*, *Kelly v. United States*, 298 F.2d 310, 312 (D.C. Cir. 1961); *Coleman v. United States*, 295 F.2d 555, 563 (D.C. Cir. 1961), *cert. den.*, 369 U.S. 813 (1962). Therefore, whether a given set of events constitutes a seizure in the Constitutional sense requires analysis of two factors. The first — the conduct of the police — has two elements: their subjective intent and the objective manifestation of that intent observable to the citizen. The first of these is undisputed and need not detain us: the Rochester Police intended to compel Dunaway's company if necessary. But the credible evidence shows that it was never necessary for the police to reveal this intent objectively, and there is little reason to think that Dunaway was cognizant of its existence. See, *Hicks v. United States*, 382 F.2d 158, 161 (D.C. Cir. 1967); *United States v. Jones*, 352 F.Supp. 369, 377-78 (S.D. Ga. 1972), *affd.*, 481 F.2d 1402 (5th Cir. 1973).

The behavior of the police when they contacted Dunaway on August 11, 1971, was free from the "physical force or show of authority" which this Court has noted is necessary for the conclusion that a seizure has occurred. *Terry v. Ohio, supra,* 392 U.S. at 19, n. 16. The police testimony shows that a lone, plainclothes officer knocked on the door of a house where he thought Dunaway might be. When the defendant answered the door, the policeman identified himself and asked the man his name. Upon learning that this individual was the defendant, the detective asked him if he would come to police headquarters. The detective was then joined by his colleague, also in plainclothes, and they walked to an unmarked car and drove uneventfully downtown. No weapons were displayed at any time and Dunaway was not handcuffed. Each police officer testified that Dunaway was not touched, and there was no other force or hint of force.

Of course it has often been noted that any contact with citizens initiated by the police is in a sense "inherently" coercive. But "coercion" in the constitutional sense does not necessarily follow from questioning which has "coercive aspects." As the Court recently reaffirmed, "[a]ny interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime." *Oregon v. Mathiason,* 429 U.S. 492, 495 (1977). This is an important distinction, since without it voluntary cooperation by a guilty citizen with the police could never assist in the conviction of that person for the crime under investigation. By any objective standard, the officers' conduct, throughout, was neither coercive nor physically threatening.

The other side of this seizure analysis concerns the perceptions of the person contacted by the police. But the analysis does not depend upon what "the [subject] himself . . . thought, but what a reasonable man, innocent of any crime, would have thought had

he been in the [subject's] shoes." *Coates v. United States,* 413 F.2d 371, 373 (D.C. Cir. 1969). See, *United States v. Wylie,* 569 F.2d 62, 68 (D.C. Cir. 1977).

It is difficult to believe that an innocent and reasonable citizen would have felt that his liberty was unduly restrained by the behavior of the Rochester Police in this case. True, there was a request for assistance from the police. But there was nothing in the police behavior to cause a reasonable and innocent citizen to fear forcible arrest had he declined the request. The evidence in the Record indicates that Dunaway himself did not feel the sort of apprehension at his contact with the police that would be required to support a finding that he was seized. According to the police testimony, he readily agreed to the request that he go downtown with the police. He knew when he agreed that the police wanted to question him. As a matter of fact, by his own testimony, he was on his way to go to the police for this purpose when Detective Mickelson knocked on the door. The only credible evidence of any reluctance on Dunaway's part was the elliptical conversation in the car. Even here Dunaway did not object to waiting until he arrived at the police station for a full explanation of what the police wanted to ask him about.

This was not Dunaway's first contact with the criminal justice system. He had earlier been convicted of a weapons charge (T.M. 438, 439). It is an inescapable inference from the credible evidence that Dunaway knew that he was exposing himself to almost certain apprehension by going with the police. His actions, and his willingness voluntarily to confess upon questioning, support the view that Dunaway was not seized.[1]

[1]The intent of the police to compel Dunaway's company if necessary becomes relevant here, for the fact that they did not have to implement these intentions indicates that Dunaway showed no knowledge of them. This, in turn, supports the inference that Dunaway accompanied the police not because he thought he had to, but because he wanted to.

Footnote continued on next page—

POINT TWO

The questioning of Dunaway and the events preceding it were reasonable under the circumstances, and violated none of his rights.

The police decided to question Dunaway after they developed their only serious lead some four months after the murder. The police reasonably suspected that Dunaway was present during the crime (A. 125-26). Also the court below found that the police questioned Dunaway under "carefully controlled conditions which were ample to protect his Fifth and Sixth Amendment rights." (A. 126). Should the Court disagree that Dunaway consented to speak with the police, the next question is whether and to what extent the police may impose on a citizen whom they reasonably suspect possesses intimate knowledge about a serious and unsolved crime.[2]

Because the Fourth Amendment prohibits only unreasonable seizures, resolution of this issue requires a balancing of society's justifiable interest in solving serious crimes against a citizen's

—*Footnote continued from preceding page*

Examination of the entire trial transcript also supports this inference. Two relatively young men planned a robbery with the help of an older man. They took the gun, which was not theirs, and went to the Pizza Shop. In the excitement of the moment, the gun went off and Mr. Argento was shot and killed. The young man panicked, abandoned the robbery and the gun and ran out of the store. The older man threatened to do away with his accomplices if they talked. What started off as a "simple" robbery had escalated into a murder. This weighed heavily on Dunaway's mind, until the police arrived. Dunaway was relieved to finally get the matter off his conscience. Dunaway himself said later, when he asked to see the detectives for his "second" statement, that he wanted to "come clean and tell the whole truth." (A. 10).

[2]The Court has heretofore not specifically considered this issue. In *Morales v. New York*, 396 U.S. 102, 105-106 (1969), the issue was specifically reserved in view of the inadequacy of the record.

freedom from arbitrary and aggressive interference by the police. *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975).[3]

An individual is protected from interference by the police when he "harbor[s] a reasonable 'expectation of privacy'" *Terry v. Ohio*, 392 U.S. 1, 9 (1968).[4] "Only legitimate expectations of privacy are protected by the Constitution." *Rakas v. Illinois*, ____U.S.____, 98 S. Ct. 421, 434 (1978) (Powell, J., concurring).[5] Just as "the specific content and incidents of this right must be shaped by the context in which it is asserted," *Terry v. Ohio*, *supra* 392 U.S. at 9, the contours of an individual's justifiable expectation of privacy vary with the attendant circumstances.[6] Furthermore, "[l]egitimation of expectations of privacy must have a source outside of the Fourth Amendment, either by

[3]"[T]here can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails." *Camera v. Municipal Court*, 387 U.S. 523 (1967). Professor LaFave has written that "[i]f stationhouse detention is to be justified, it is under the *Camera-Terry* formula, which stresses the balancing of the intrusion against the need." 3 LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* §9.6(b) at 157 (1978).

[4]Quoting from *Katz v. United States*, 389, U.S. 347, 361 (1967) (Harlan, J., concurring).

[5]"Obviously, . . . , a 'legitimate' expectation of privacy by definition means more than a subjective expectation . . ." *Rakas v. Illinois, supra*, 99 S. Ct. at 430 n.. 12. "[I]t is not enough that an individual desired or anticipated that he would be free from governmental intrusion. Rather, for an expectation to deserve the protection of the Fourth Amendment, it must 'be one that society is prepared to recognize as reasonable.'" *Rakas v. Illinois, supra*, 99 S. Ct. at 435 (Powell, J., concurring) (quoting from *Katz v. United States, supra*, 389 U.S. at 361 (Harlan, J., concurring).

[6]"The ultimate question, therefore, is whether one's claim to privacy from government intrusion is reasonable in light of all the surrounding circumstances . . ." *Rakas v. Illinois, supra* 99 S. Ct. at 435 (Powell, J., concurring).

reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Rakas v. Illinois, supra,* 99 S. Ct. at 431 n.12.

The intense and entirely justifiable public interest in law enforcement cannot be denied. In this case it significantly exceeded the general interest in having crimes solved. A brutal murder had remained unsolved for over four months despite diligent investigation. The case had received widespread media attention and the level of public interest was unusually high.[7] The fact that the police were stalemated in their investigation increased the community's tension and anxiety concerning the case. Furthemore, when the police acquired the information which connected Dunaway with the murder, they had no practical investigative alternatives but to question him.[8] In short, this was not a routine case. Rather, a particularly heinous crime had been committed which the police were under the "highest duty" to solve. See, *Watts v. Indiana,* 338 U.S. 49, 58 (1949) (Jackson, J., concurring and dissenting). The public need to question Dunaway was, therefore, most compelling.

Against this high degree of public interest in solving the crime and questioning Dunaway must be weighed the degree and kind of intrusion to which he was subjected. When he met the police, Dunaway's sister had already informed him that they wished to question him. Dunaway was leaving to meet them as the police arrived at the door. The record contains virtually no dispute

[7]The record of the jury selection is replete with references to the high level of public interest in the case. (T.M. 117, 146, 151-52, 157-58, 170-71, 189, 194, 196-*et seq.*)

[8]The dissent below (A. 131) and the A.C.L.U. suggest that the police should first have talked to Hubert Adams. But this begs the question. Irrespective of what Adams might have said, the police still had to talk to Dunaway. Of course, if the police had talked first to the other perpetrator, "Ra-Ba" Adams (as the dissent below suggests), then the same constitutional issues may have been raised by a petitioner with a different name.

concerning the nature of the detention. As Dunaway himself testified, the police were polite, otherwise non-abusive and did not threaten or cajole him in any manner. He waived his Fifth and Sixth Amendment rights after proper warning and confessed about 20 minutes after he arrived at the Public Safety Building (A. 9). Dunaway also testified that he gave the statement voluntarily (A. 41), and spoke "willingly to the police." (T.M. 417) Viewed in its worst light, Dunaway was "detained" for a brief time and under carefully controlled and non-abusive conditions which amply protected his Fifth and Sixth Amendment rights.[9]

Moreover, the police had justifiable reason to question Dunaway. An informant, known to the police, told them that while in jail he had learned from a fellow inmate, James Cole, that Dunaway and another were responsible for the shooting. The informant picked Dunaway's picture from a group of mugshots. The police interviewed Cole at the jail and verified the informant's information. After four months, this was the only lead the police had, and it certainly cast reasonable suspicion upon Dunaway. See, *Terry v. Ohio, supra,* 392 U.S. at 20-22.

The fact that the police were reasonably suspicious is important because it demonstrates that Dunaway was not arbitrarily seized as part of a "lawless dragnet detention." *Cf. Davis v. Mississippi,* 394 U.S. 721 (1969).[10] The police did not

[9]The police did not use the occasion of the "seizure" as a pretext to achieve collateral objectives such as a full search incident to an arrest. *Cf., Brown v. Illinois, supra,* 422 U.S. at 611 (Powell, J., concurring); *United States v. Robinson,* 414 U.S. 218, 237-38 n. 2 (1973) (Powell, J., concurring). In fact, Dunaway was not searched at all. *Cf. Cupp v. Murphy,* 412 U.S. 291, 295 (1973).

[10]The quoted phrase comes from *United States v. Dionisio,* 410 U.S. 1, 11 (1973), which identifies the "dragnet" aspects of the police conduct in *Davis* as the "chief evil" struck down. *But see, id.,* at 39-40 (Marshall, J., dissenting).

scour the neighborhood committing "wholesale intrusions upon the personal security of our citizenry." *Id.*, 394 U.S. at 726.

The imposition which attends a brief and reasonable "detention" such as this one is a lesser intrusion than an arrest.[11] An arrest in New York is designed to take an accused into custody and to begin a criminal prosecution. Former New York Code Crim. Proc. §147.[12] It necessarily implies a future restraint of liberty until the charges are disposed. In addition, unlike the type of "detention" here, the "booking" which attends a formal arrest assures that the event will be recorded and that the individual will have an arrest record. Moreover, when the police picked him up, Dunaway could not reasonably have thought that he was being arrested for the murder.[13] Had

[11] "A requirement that a suspect appear briefly at the police station, to be sure, is in some respects more intrusive than a brief stop on the street, but it is nonetheless a lesser intrusion than an arrest, which is the initial stage of a criminal prosecution," 'is intended to vindicate society's interest in having its laws obeyed, and * * * is inevitably accompanied by future interference with the individual's freedom of movement, whether or not trial or conviction ultimately follows.' 3 *LaFave, Search and Seizure: A Treatise on the Fourth Amendment* §9.6(b) at 155 (1978) (quoting from *Terry v. Ohio, supra*).

[12] New York's present Criminal Procedure Law, which did not carry forward the cited provision defining arrest, took effect after the events in this case. No substantive change was intended. See, Pitler, *New York Criminal Practice under the CPL* §2.17 at 111 (1972).

[13] Judge Kaufman once observed:

> "A layman, if asked if he had ever been arrested, would not be likely to describe situations where he had been stopped by a police officer, . . . , or even situations where his questioning had been continued at a police station, as arrests. The common conception of an arrest, like the technical definition, comprehends the formal charging with a crime." *United States v. Bonanno*, 180 F.Supp. 71, 78 (S.D.N.Y. 1960), *rev. on other grounds sub. nom., United States v. Bufalino*, 285 F.2d 408 (2nd Cir. 1960).

Of course, the fact that no formal arrest occurred is not *solely* determinative, but it is relevant to the degree of intrusion which must be weighed against the public need to investigate.

Dunaway said nothing or cleared himself, he would not have been arrested.[14]

Assessment of Dunaway's asserted right to be completely free from any official interference must be considered in light of the great public interest in a brutal murder case, the solution of which had eluded the police for over four months.

> [I]t is not easy to articulate offense-category limitations as a matter of Fourth Amendment interpretation. Yet it is important here, just as with the stopping of suspects on the street and the employment of roadblocks, that such limitations be developed. If station-house detention is to be justified, it is under the *Camera-Terry* formula, which stresses the balancing of the intrusion against the need. The need factor cannot be assessed in a sensible fashion without considering the magnitude of the offense under consideration; extraordinary procedures which might be justified in an attempt to solve a homicide, . . . , are not appropriate to determine whose fingerprints are on a bag of marijuana. 3 LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* §9.6 (b) at 156-57 (1978).

Of course, this does not mean that the Fourth Amendment is suspended merely because a crime is serious. But the privacy which deserves the protection of the Fourth Amendment is that which "society is prepared to recognize as reasonable." *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). The seriousness of this crime, and the intense public interest in its solution must be significant entries on the scales by which the

[14] For example, James Cole was not arrested. The police realized that the information they possessed was not sufficient to charge Dunaway with the crime. Even when Dunaway stated that he knew something of the crime, the police did not yet believe he was sufficiently implicated to charge him with its commission. (T.M. 301).

reasonableness of the police conduct is weighed,[15] as must the fact that the police lacked viable investigative alternatives.

The reasonableness of Dunaway's expectations of privacy must also be assessed against the historical duty citizens have to come forward with information about unsolved crimes. The Court has often recognized that this duty is deeply rooted in our traditions. See, *United States v. New York Telephone Company*, 434 U.S. 159, 175-76 n. 24 (1977).[16] This obligation has not often been considered where a witness turns out to be the defendant because the cases have usually arisen in the context of flagrant abuse and clear testimonial compulsion. See, *e.g. Brown v. Mississippi*, 297 U.S. 278 (1936); *Spano v. New York*, 360 U.S. 315 (1959).[17] But as Dunaway himself made clear, both at the suppression hearing and at trial, his confession was voluntary and he spoke willingly to the police.

---

[15]"Would not the policy of the Fourth Amendment be ... served by an approach which determines the reasonableness of each investigative technique by balancing the seriousness of the suspected crime and the degree of reasonable suspicion possessed by the police against the magnitude of the invasion of the personal security ... of the individual involved." Barrett, *Personal Rights, Property Rights, and The Fourth Amendment*, 1960 Sup. Ct. Rev. 46, 63.

[16]See also *Roviaro v. United States*, 353 U.S. 53, 59, (1957) ("obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officials"); *Hamilton v. Regents*, 293 U.S. 245, 265 n. (1934) (Cardozo, J., concurring); *In Re Quarles and Butler*, 158 U.S. 532, 535 (1895) ("right and ... duty to communicate to the executive officers any information which he has of the commission of an offense against those laws"); *Matter of Babington v. Yellow Taxi Corp.*, 250 N.Y. 14, 16-17, 164 N.E. 726, 727 (1928) (Cardozo, Ch. J.) (and authorities cited therein).

[17]"The question whether it would be desirable for a suspect to participate as both a giver and receiver of information and, more particularly, to admit his crime if he is, in fact, guilty has had to be answered in the shadow of the third degree." Weinreb, *Denial of Justice* 149 (1977).

Society's expectation that citizens assist in crime investigation[18] helps shape its assessment of the reasonableness of an individual's asserted privacy rights. Nothing in the Fifth Amendment suggests that this is any less true when the individual turns out to be a defendant.[19] A person who is reasonably suspected of having knowledge of unsolved crime can have no justifiable expectation that the authorities may not question him about it. Where no issue of testimonial compulsion is present, the duty of a citizen to come forward with evidence of crime is relevant to the determination of the extent of his Fourth Amendment rights.[20]

---

[18]This expectation is expressed in a number of statutes and rules. See, *e.g.*, Fed. Rules Crim. Proc. Rule 17; N.Y. Crim. Proc. Law, Art. 620; N.Y. Penal Law § 195.10.

[19]In *United States v. Dionisio*, 410 U.S. 1 (1973), the court held that a grand jury subpoena is not a Fourth Amendment "seizure" even though it may be inconvenient or burdensome. The burden imposed on the citizen is justified by the "historically grounded obligation of every person to appear and give his evidence before a grand jury ..." 410 U.S. at 9-10. Thus, "a 'grand jury subpoena to testify is not the kind of governmental intrusion on privacy against which the Fourth Amendment affords protection, once the Fifth Amendment is satisfied.' *Fraser v. United States*, 452 F.2d 616, 620 (7th Cir. 1971)." 410 U.S. at 10. We submit that the civic obligation we refer to should enter into the balance which determines the reasonableness of a seizure and, specifically, the extent of Dunaway's justifiable expectation of privacy.

[20]Saying that an individual *should* give information he possesses about an unsolved crime is not the same as saying that he is *compelled* to do so. This follows because the Fifth Amendment provides that the state may not impose a penalty for non-performance of that obligation when performance would mean self-incrimination. The state only acts improperly if it *compels* incriminating information from a person. Moreover, "compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment." *Boyd v. United States*, 116 U.S. 616, 633 (1885). Likewise, the fact that Dunaway was not the subject of testimonial compulsion tends to show that he was not unreasonably seized in the Fourth Amendment sense.

Moreover, it should not be forgotten that this murder was a most disturbing intrusion into the lives of the citizens of Rochester, nor that community anxiety was heightened the longer the murder remained unsolved. Consequently, society should be less inclined to recognize as reasonable Dunaway's asserted right to be left absolutely alone, especially since questioning him (or another suspect with the same "right") was virtually the only chance of solving the murder.

Finally, the investigative procedures followed by the police in this case also "protect[s] those who are readily able to exculpate themselves from being arrested and having formal charges made against them before their explanations are considered." *United States v. Vita*, 294 F.2d 524, 530 (2nd Cir. 1961). See, *United States v. Middleton*, 344 F.2d 78, 83 (2nd Cir. 1965). For example, the investigation in this case exculpated James Cole, who was implicated with Dunaway in the initial version of the incident that the police obtained. Before contacting Dunaway, the police questioned Cole and concluded the interview satisfied that he played no part in the killing. Nothing in the record suggests that the police did not believe that an interview with Dunaway might not end in the same way. While society has an interest in ascertaining the identity of those who commit crime, it also has an interest in ascertaining who is innocent among those suspected. Questioning is a most efficacious means of achieving these objectives especially when there are no viable investigative alternatives.[21] As the Second Circuit has held, "[i]f the purpose is

[21]"That thorough investigation is necessary for considered and effective administration of the criminal law is a truism which has its roots in the earliest codes of law. *See, e.g.*, Old Testament, Deuteronomy, 13:14, 19:18. It is only in the world of fiction that investigation can be conducted impersonally — that perceptive individuals such as Sherlock Holmes and Hercule Poirot can by some mysterious amalgam of intelligence and intuition solve the most puzzling of crimes and bring to justice the most devious and evasive of criminals. In the world as it is, face-to-face interrogation is the most useful tool in the discovery and prosecution of law breakers." *United States v. Vita*, 294 F.2d 524, 532 (2nd Cir. 1961); See generally, *Collins v. Beto*, 348 F.2d 823, 836 (5th Cir. 1965) (Friendly, J., concurring).

investigatory and not simply to keep the accused in custody until he confesses, if the police have good reason to believe that the suspect must be questioned further in order to determine whether he or any other person ought to be arrested, detention for a reasonable period of time is permissible and any confession obtained during it is admissible." *United States v. Vita, supra*, 294 F.2d at 533.

In short, Dunaway's justifiable and reasonable expectation of privacy, his asserted right to be entirely free from the intrusion visited upon him on the morning of August 11, 1971, was subordinate to society's imperative to solve the murder. The police were reasonable, in the Fourth Amendment sense, by briefly detaining Dunaway for questioning under carefully controlled conditions which protected his Fifth and Sixth Amendment rights.

Members of the Court have recognized the need for, and reasonableness of, brief detention for questioning of those persons the police reasonably suspect have knowledge of crime. In *Watts v. Indiana*, 338 U.S. 49, 58 (1949), Mr. Justice Jackson asserted in a case much like this one that custodial questioning on less than probable cause is sometimes indispensible.[22]

> In each case police were confronted with one or more brutal murders which the authorities were under the

[22]As the following excerpt demonstrates, Mr. Justice Jackson was most sensitive to Fourth Amendment concerns.

> "These [Fourth Amendment] rights, I protest, are not mere second class rights but belong in the catalog of indispensible freedoms. Among deprivation of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government." *Brinegar v. United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting).

> highest duty to solve. Each of these murders was unwitnessed, and the only positive knowledge on which a solution could be based was possessed by the killer.
>
> In each there was reasonable ground to *suspect* an individual but not enough legal evidence to *charge* him with guilt. In each the police attempted to meet the situation by taking the suspect into custody and interrogating him.
>
> • • •
>
> [N]o one suggests that any course held promise of solution of these murders other than to take the suspect into custody for questioning. The alternative was to close the books on the crime and forget it, with the suspect at large. This is a grave choice for . . . society . . .
>
> • • •
>
> I doubt very much if [the Constitution and Bill of Rights] require us to hold that the state may not take into custody and question one suspected reasonably of an unwitnessed murder. If it does [sic], the people of this country must discipline themselves to seeing their police stand by helplessly while those [accurately] suspected of murder prowl about unmolested. *Id.*, 332 U.S. at 58, 61-62 (Jackson, J., concurring and dissenting) (emphasis in original).

Later, on the day *Mapp v. Ohio*, 367 U.S. 643 (1961) was decided, Mr. Justice Frankfurter recognized the need for custodial questioning on less than probable cause.

> The occasion which in December 1956 confronted the Connecticut State Police with two corpses and an infant as their sole informants to a crime of community-disturbing violence is not a rare one. Despite modern advances in the technology of crime detection, offenses frequently occur about which things cannot be made to speak. And where there cannot be found innocent human witnesses to such offenses, nothing remains — if police investigation is not to be balked before it has fairly begun — but to seek out possibly guilty witnesses and ask them questions, witnesses, that is, who are suspected of knowing something about the offense precisely because they are suspected of implication in it.

> The questions which these suspected witnesses are asked may serve to clear them. They may serve, directly or indirectly, to lead the police to other suspects than the persons questioned. Or they may become the means by which the persons questioned are themselves made to furnish proofs which will eventually send them to prison or death. In any event, whatever its outcome, such questioning is often indispensable to crime detection. Its compelling necessity has been judicially recognized as its sufficient justification, even in a society which, like ours, stands strongly and constitutionally committed to the principle that persons accused of crime cannot be made to convict themselves out of their own mouths. *Culombe v. Connecticut*, 367 U.S. 568, 570-71 (1961).

The questioning of Dunaway was thus justified by "the overwhelming public interest and the plain unvarnished fact that without such power society would often find itself helpless to solve crimes and protect its members." *United States v. Vita, supra*, 294 F.2d at 534. Because the murder was unwitnessed (except by the victim's wife who could remember very little) and the police had no viable investigative alternatives, failure to question Dunaway would have been, as Judge Denman in the court below stated, "contrary to responsible police conduct." (A. 128).

New York's rule permitting brief detention for questioning of people reasonably suspected of possessing knowledge of serious crime does not give the police "broad and unlimited discretion." *Cf. United States v. Brignoni-Ponce, supra*, 422 U.S. at 882. Under the Court of Appeals ruling in *People v. Morales*, 42 N.Y.2d 129 (1977), the police must justify their conduct with a clear showing of need under specific circumstances warranting the intrusion. Moreover, the manner and length of questioning must conform to rigid standards of reasonableness and conformance with Fifth and Sixth Amendment safeguards, which were met in this case.

Therefore, sanctioning of the behavior of the police in this case would not mean an abandonment of effective judicial super-

vision of police conduct in investigations of this nature. *Cf. Pennsylvania v. Mimms*, 434 U.S. 106, 121-22 (1977) (Stevens, J., dissenting). The New York Courts have demonstrated a willingness to closely scrutinize these types of investigations and carefully test them for reasonableness. See *e.g., People v. Morales, supra; People v. Kocik*, 63 A.D.2d 230 (4th Dept. 1978) (striking down a purported detention for questioning as unnecessary and arbitrary).[23] As Mr. Justice Frankfurter stated in *McNabb v. United States*, 318 U.S. 332 (1943):

> [R]eview by this Court of state action expressing its notion of what will best further its own security in the administration of criminal justice demands appropriate respect for the deliberative judgment of a state in so basic an exercise of its jurisdiction. (318 U.S. at 340) (quoted and approved in *Cupp. v. Naughten*, 414 U.S. 141, 149 (1973).

Where the state courts do not abdicate their responsibility to ensure the protections of the Constitution, their judgment as to the procedures appropriate for vindication of these rights is entitled to deference.[24]

---

[23]The Second Circuit recognized that judicial supervision is adequate to police detention for questioning. "[T]he possibility that powers given to law enforcement officers may be abused does not require government agents to be left powerless to make reasonable inquiry. The reasonableness of their behavior may be assured by close judicial supervision of the methods used." *United States v. Vita, supra*, 294 F.2d at 530-31.

[24]Petitioner suggests that even if a detention of the kind involved in this case is permissible in certain limited instances, the police must first obtain a warrant. But the question of the need for a warrant for detentions on reasonable suspicion is not fairly presented in this case. There was no authority, either in New York law or in federal law (see, *United States v. Vita, supra*), which would have alerted the police that a warrant procedure was available. Moreover, the Court has never held that a warrant is essential to effect an arrest on probable cause, even when no exigent circumstances are present. See, *United States v. Santana*, 427 U.S. 38 (1976); *United States v. Watson*, 423 U.S. 411 (1976); *Gerstein v. Pugh*, 420 U.S. 103, 113 (1975).

POINT THREE

Dunaway's statements and the resultant evidence were properly admitted at trial; by any measure, the supposed taint was insufficient to require exclusion.

Evidence obtained after an unauthorized arrest is often excluded at trial, because it is said to be the "fruit of the poisonous tree," or "tainted" by the Fourth Amendment violation. *Wong Sun v. United States*, 371 U.S. 471 (1963); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Nardone v. United States* 308 U.S. 338 (1939). But the existence of an initial Fourth Amendment violation does not *per se* require suppression of evidence obtained thereafter, even if "it would not have come to light but for the illegal actions of the police." *Brown v. Illinois*, 422 U.S. 590, 603 (1975); *Wong Sun v. United States, supra*, 371 U.S. at 487-88. In *Brown*, the Court noted that "persons arrested illegally frequently may decide to confess, as an act of free will unaffected by the initial illegality." 422 U.S. at 603. In such a case the confession need not be suppressed because the "taint" of the initial illegality has been sufficiently "purged." *Wong Sun v. United States, supra*, 371 U.S. at 486. Thus despite an initially illegal arrest, the prosecution is given an opportunity to show the evidence is nonetheless admissible. *Brown v. Illinois, supra*, 422 U.S. at 604; *Wong Sun v. United States, supra*, 371 U.S. at 486.

In Brown, the only evidence supporting the admissibility of statements obtained after an illegal arrest was that the defendant had been advised of his *Miranda* warnings at some point during his interrogation. On the facts of that case, the Court reversed Brown's conviction, noting that the Illinois Courts "were in error in assuming that the *Miranda* warnings, by themselves, under *Wong Sun* always purge the taint of an illegal arrest." *Brown v. Illinois, supra*, 422 U.S. at 605. The Court emphasized that the question whether a confession is admissible under *Wong Sun* "must be answered on the facts of each case",

and noted several factors which invalidated the *"per se"* assumption of the Illinois Supreme Court. *Brown v. Illinois, supra,* 422 U.S. at 603, 604-605. The facts in *Brown* were significantly different from the facts in this case, and we submit that Dunaway's statements were properly received in evidence under the *Wong Sun* standards.

While perhaps not dispositive, the nature and extent of the protections given Dunaway's Fifth and Sixth Amendment rights are important considerations on the issue of admissibility of his statements. *Brown v. Illinois, supra,* 422 U.S. at 603. In *Brown,* the defendant had been questioned about the murder before being told of his *Miranda* rights. 422 U.S. at 593-94. In Dunaway, there was virtually no conversation between the defendant and the police (about anything) until Dunaway was carefully advised of his *Miranda* warnings. Dunaway was given his *Miranda* rights the moment he acknowledged knowing about the crime. As Detective Novitskey testified, "[w]e have to let him know [what] we are going to talk about . . . so he can know whether to waive his rights." (A. 19).

Moreover, the police in Dunaway did not use the *Miranda* warnings in the "talismanic" manner that concerned the Court in *Brown.* 422 U.S. at 603. Detective Novitskey testified that he did not merely "read the guy his rights" from a "rights card" but advised Dunaway of his *Miranda* rights from memory, speaking much slower than he did when he was asked at the *Huntley* Hearing [25] to recite the rights for defense counsel (A. 16-17). Immediately after advising Dunaway of his *Miranda* rights, Novitskey asked Dunaway if he understood. Dunaway acknowledged that he did. Novitskey then asked if Dunaway would be willing to talk to him without a lawyer, and Dunaway

[25]See, *People v. Huntley,* 15 N.Y.2d 72 (1965), which is New York's procedural response to *Jackson v. Denno,* 378 U.S. 368 (1964). *Cf.* 18 U.S.C. §3501.

said he would (A. 8, 18). Dunaway's understanding of his rights was reaffirmed at each contact between him and the police (A. 6, 9, 10, 24-25). Dunaway himself testified (twice) that he was not abused or coerced by the police and that he spoke with them willingly and voluntarily (A. 41; T.M. 417). The trial court found that Dunaway's statements to the police were "entirely voluntary," and that finding was not disturbed in the subsequent history of the case (A. 43).[26]

While we recongize that merely advising a person of his *Miranda* rights will not always purge the taint of an illegal arrest, we submit that these facts show that Dunaway's Fifth and Sixth Amendment rights were scrupulously protected by the police in this case. And, further, there can be no better proof of the "degree of free will exercised by the witness" than the witness's own words. *United States v. Ceccolini,* 435 U.S. 268, 276 (1978). See, *Brown v. Illinois, supra,* 422 U.S. at 610 (Powell, J. concurring). In short, we believe that the overwhelming proof that Dunaway's statements were voluntary is an important consideration supporting our position that the evidence was properly received at trial.[27]

[26]Additionally, the trial court found that "Dunaway intelligently understood the [*Miranda*] warnings and knowingly expressed his waiver of his Constitutional rights . . . [The statements] were knowingly made and were made with the knowledge of the so-called *Miranda* rights." (A. 43). After the post-conviction hearing, the trial court reaffirmed that there was "no question that the inculpatory statements and sketches made by the defendant were voluntary . . . and that there was full compliance with the mandate of Miranda . . ." (A. 117).

[27]The majority at the Appellate Division noted that "[d]efendant's testimony that he was never threatened or abused by the police and that the statements he made to them were voluntary, along with the police testimony concerning the fact that defendant was given his *Miranda* rights, lend strong support for the conclusion that defendant's confessions were the product of his free will and that the police conduct here, subsequent to defendant's initial detention, was highly protective of defendant's Fifth and Sixth Amendment rights." (A. 127).

Additionally, we submit that the "taint" created by the police conduct in this case was *de minimus*, at most. See, Points I and II, *supra*. Therefore the Court should require very little additional proof of voluntariness beyond the Fifth and Sixth Amendment requirements. As Mr. Justice Powell has observed, "the point at which the taint can be said to have dissipated should be related, in the absence of other controlling circumstances, to the nature of that taint". *Brown v. Illinois, supra*, 422 U.S. at 609 (concurring opinion).

In *Brown*, the Court noted several additional considerations which were important to the question of the admissibility of the confession obtained in that case. Of particular relevance were the "purpose and flagrancy of the official misconduct." *Brown v. Illinois, supra*, 422 U.S. at 604. A comparison of the facts in *Brown* with those in the present case is most instructive on these two points.

In *Brown*, the defendant was arrested at gun point, searched and accused of a murder with hardly a scintilla of evidence casting suspicion upon him. See, *Brown v. Illinois, supra*, 422 U.S. at 592. The situation was different with Dunaway. The details of the purpose for questioning Dunaway are explored in Point II, *supra;* suffice here to say that the police wanted to talk to the only solid lead they had obtained in over four months on a most intolerable and brutal murder.

Furthermore, there simply was no flagrant violation of Dunaway's Fourth Amendment rights. Unlike *Brown*, Dunaway was not confronted by apprehension at gun point, body searches, handcuffs, questioning before *Miranda* rights, obvious shows of force, lengthy initial questioning, asportation with the police for further investigation, or formal arrest and accusation. 422 U.S. at 592-93. On the contrary, the police here did not use the "seizure" as a calculated effort "to cause surprise, fright and confusion." *Brown v. Illinois, supra*, 422 U.S. at 605. Dunaway knew that the police were looking for him for questioning, and in

fact he was on his way to meet them for this purpose when they arrived (A. 32, 87). If the considerations set forth in Point I, *supra*, fall short of establishing that Dunaway consented to be questioned by the police, they are strong evidence nonetheless on the lack of flagrancy or coercion in Dunaway's contact with the police.

The flagrancy of the police behavior in *Brown* had another important facet not present in Dunaway. In *Brown* the "impropriety of the arrest was obvious[ly]" in violation of established Fourth Amendment principles. 422 U.S. at 605. The police in *Brown* forcefully and formally arrested the defendant and charged him with a crime based on virtually no evidence, let alone probable cause. By contrast, the Rochester police were acting lawfully under the existing law of New York. *People v. Morales*, 22 N.Y.2d 55 (1968). The questioning of Dunaway was based on "reasonable suspicion," occurred for a "reasonable and brief period of time," and was conducted "under carefully controlled conditions protecting his Fifth and Sixth Amendment rights." 22 N.Y.2d at 64. See Point II, *supra*. The Rochester police thought the procedure they were following was in accord with established principles.[28]

---

[28]Thus, this was not a situation in which the police "knew or should have known" that their behavior was unconstitutional. *Brown v. Illinois, supra*, 422 U.S. at 606 (White, J., concurring).

The testimony of the detective in charge of the investigation fully establishes his good faith:

> Q. You're allegedly saying that your information was sufficient to physically pick up a suspect and bring him down to headquarters?
>
> A. I wouldn't do it any other way, counselor.
>
> • • •
>
> A. I think I had probable cause to bring him in and pick him up. I doubt if I had probable cause to charge him.

Footnote continued on next page—

In discussing the flagrancy of the police behavior in *Brown*, the Court cited several lower Federal Court cases. 422 U.S. at 604, n.9. one of these was remarkably similar to the situation in Dunaway. In *United States v. Kilgen*, 445 F.2d 287 (5th Cir. 1971), the police arrested an individual under a vagrancy statute. After the arrest, the police obtained a statement from the defendant which was admitted into evidence at trial on other charges. The vagrancy statute was later overturned as unconstitutional, but the Court held that the confession was properly admitted into evidence since the defendant "was detained and charged *in good faith reliance on an ordinance not yet held invalid.*" 445 F.2d at 289-290 (emphasis supplied).

This analysis is consistent with the policies of the exclusionary rule, and shows why it would be inappropriate to invoke that rule on behalf of the defendant in this case. See, *Stone v. Powell*, 428 U.S. 465, 489, n.26.[29] The exclusionary rule rests on two major premises, both entirely salutory. The initial justification

—*Footnote continued from preceding page*

> Q. You differentiated between probable cause to arrest a person and probable cause to charge a person?
>
> A. Right, counselor.
>
> • • •
>
> A. Probable cause to obtain a warrant, you must have enough information to substantiate a charge. In probable cause of picking up a man for questioning, which is done all the time based on information, this is done also.
>
> • • •
>
> A. That is to bring him in. I think I have that right as a police officer. If I haven't, I just found out. (A. 61).

[29]"The notion of the 'dissipation of the taint' attempts to mark the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost." *Brown v. Illinois, supra*, 422 U.S. at 609 (Powell, J., concurring).

of the rule rested on the so-called "imperative of judicial integrity." *Mapp v. Ohio*, 367 U.S. 643, 659 (1961).[30] The courts should not become accessories to violations of the Constitution.

More recently, however, the Court has emphasized a deterrent rationale for the exclusionary rule. The primary purpose of the exclusionary rule is "to compel respect for the Constitution . . . in the only effectively available way — by removing the incentive to disobey it." *Elkins v. United States*, 364 U.S. 206, 217 (1960). In fact, the Court has recently suggested that deterring Constitutional violations by the police is the "sole" purpose of exclusion.[31]

As a practical matter, the two policies coalesce and the inquiry into whether exclusion serves the one purpose or the other is "essentially the same." *United States v. Janis*, 428 U.S. 433, 459 n.35 (1976). *United States v. Peltier*, 422 U.S. 531, 538 (1975).[32] As the Court noted in *Janis*, the "imperative of judicial integrity" does not require in all instances that evidence illegally obtained may not be admissible in a criminal prosecution (428 U.S. at 458, n.35). This follows from the Court's approval of the use of evidence obtained in violation of the Fourth Amendment where the defendant fails to object to its admission and where the

[30]Nothing in *Weeks v. United States*, 232 U.S. 383 (1914), which announced the federal rule of exclusion can be read as setting forth a deterrent rationale for the exclusionary rule. See, Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. Ill. L. F. 518, 536-37.

[31]"The Court, however, has established that the 'prime purpose' of the rule, if not the sole one, 'is to deter future unlawful police conduct.' *United States v. Calandra*, 414 U.S. 338, 347 (1974)." *United States v. Janis*, 428 U.S. 433, 446 (1976).

[32]"The analysis showing that exclusion in this case has no demonstrated deterrent effect and is unlikely to have any significant such effect shows, by the same reasoning, that the admission of the evidence is unlikely to encourage violations of the Fourth Amendment." *United States v. Janis, supra*, 428 U.S. at 458 n. 35.

defendant lacks "standing" to challenge the police conduct. *Rakas v. Illinois*, ____U.S.____99 S. Ct. 421, 425 at n.3 (1978); *Alderman v. United States*, 394 U.S. 165, 174-75 (1969). See generally, *Stone v. Powell, supra*, 428 U.S. at 485-86; *United States v. Janis, supra*, 428 U.S. at 458, n.35; *United States v. Calandra*, 414 U.S. 338, 348 (1974).

When police behavior is particularly intrusive and willfully violative of an individual's Fourth Amendment freedoms, the exclusionary rule is appropriately invoked, since suppression deters "future unlawful police conduct." *United States v. Calandra, supra*, 414 U.S. at 347. This was the case in *Brown*, where the police obviously knew that their conduct was improper. (422 U.S. at 605). Indeed, most of the decisions of this court pertaining to the exclusionary rule have turned upon an analysis of what might be termed flagrant police conduct. See, e.g., *Stone v. Powell, supra; United States v. Janis, supra; United States v. Peltier, supra; Michigan v. Tucker*, 417 U.S. 433 (1974); *United States v. Calandra, supra*. See also, *Stevens v. Wilson*, 434 F.2d 867 (10th Cir. 1976); *United States v. Edmons*, 432 F.2d 577 (2nd Cir. 1970).

But "where the official action was pursued in complete good faith, . . . , the deterrence rationale loses much of its force." *Michigan v. Tucker, supra*, 417 U.S. at 447.[33] The Rochester police were acting in complete good faith and a decision of their state's highest court gave them reasonable grounds for their good faith belief. Egregious police conduct involving willful and flagrant violations of citizens' constitutional freedoms is not present in the instant case. Instead, the Record is free of any

[33]Furthermore, "the 'imperative of judicial integrity' is also not offended if law enforcement officials reasonably believed in good faith that their conduct was in accordance with the law even if decisions subsequent to the search or seizure have held that conduct of the type engaged in by the law enforcement officials is not permitted by the Constitution." *United States v. Peltier, supra*, 422 U.S. at 437-38.

showing of intentional misconduct by the police, and the facts show conscientious and experienced police officers exercising their duties in good faith and with exemplary regard for the rights of a citizen suspected of a crime.

"The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right," *Michigan v. Tucker, supra*, 417 U.S. at 447. It is difficult to understand why the exclusionary rule should apply to cases, such as this one, in which that assumption is invalid. Accurate and reliable evidence, voluntarily given by a defendant after a "technical" and good faith violation of the Fourth Amendment should not be excluded. *Brown v. Illinois, supra*, 422 U.S. at 610-611 (Powell, J., concurring).[34] This is especially true in this case, where there is no question that the defendant's Fifth and Sixth Amendment rights were scrupulously protected during his contact with the police. See, *Brown v. Illinois, supra*, 422 U.S. at 611-612 (Powell, J., concurring).

Should this Court overrule *Morales*, then of course, it may also be required to find that Dunaway's initial contact with the police was illegal. But if such is the case it is difficult to imagine a more clear-cut instance of the police behaving "in the good-faith belief that [their] conduct comported with existing law and having reasonable grounds for this belief." *Stone v. Powell, supra*, 428 U.S. at 538 (White, J., dissenting).

In addition to the good faith nature of the police conduct, the high degree of voluntariness of the challenged confession (see,

[34]This is the view of the New York Court of Appeals, which wrote that "[t]he controlling consideration for determining the admissibility of 'verbal' evidence obtained pursuant to claimed illegal police conduct is whether law enforcement officers acted in good faith and with a fair basis for belief that probable cause existed for an arrest." *People v. Martinez*, 37 N.Y.2d 662 (1975).

Point II B, supra) also serves to reduce the efficacy of the exclusionary rule in this case. The "*degree* of free will exercised by the witness is . . . [r]elevant in determining the extent to which the basic purpose of the exclusionary rule will be advanced by its application." *United States v. Ceccolini, supra,* 435 U.S. at 276.[35] The alleged illegality which provided the occasion for the initial contact between Dunaway and the police did not, as it very often will not in cases of this nature, "play any meaningful part" in his decision to confess. *Id.; Brown v. Illinois, supra,* 422 U.S. at 610 (Powell, J., concurring). Where the police are relatively non-intrusive, act in complete good faith, clearly protect the defendant's Fifth and Sixth Amendment rights, and the defendant himself testifies that he spoke willingly to the police and voluntarily confessed, this conclusion is inescapable. The deterrent policies of the exclusionary rule are therefore not invoked and its application to exclude Dunaway's confession would be futile.

To hold otherwise would offend our shared sense of proportionality, which is a necessary ingredient to our sense of justice. The inherent reliability and relevancy of Dunaway's confession is unquestioned. No one suggests that his statements to the police are not trustworthy. Thus, *a fortiori* application of the exclusionary rule would insulate from the jury "the most probative information bearing on the guilt or innocence of the defendant" and would lessen the reliability of the fact-finding process and probably set a person guilty of a heinous and brutal murder free. *Stone v. Powell, supra,* 428 U.S. at 490. See, *id.,* 428 U.S. at 540 (White, J., dissenting); *United States v. Ceccolini, supra,* 435 U.S. at 277-278.

[35]"[T]he notion of voluntariness has practical value in deciding whether the [exclusionary] rule should apply to statements removed from the immediate circumstances of the illegal arrest." *Brown v. Illinois, supra,* 422 U.S. at 610 (Powell, J., concurring).

Similarly, application of the exclusionary rule in this case would also offend our sense of justice.

> The disparity in particular cases between the error committed by the police officer and the windfall given by the rule to the criminal is an affront to popular ideas of justice. Indeed, this lack of proportionality demonstrates why the exclusionary rule cannot be justified as a moral imperative preventing the courts from soiling themselves with tainted evidence. Proportionality is a major element of our sense of justice. The lack of proportionality between the crime and the punishment was shocking when Jean Valjean received what amounted to a life sentence for stealing a loaf of bread, and a similar sense of injustice arises from the disparity between the police officer's error and the failure because of it to punish one who has committed a serious crime. Kaplan, *The Limits of the Exclusionary Rule,* 26 Stan.L.Rev. 1027, 1036 (1974).[36]

When the police intrusion is not only trivial, but also is in complete good faith, this argument becomes even more compelling.

In short, we believe that Dunaway's statements were sufficiently the product of his free will to be admissible irrespective of the legality of his original contact with the police, and also that the policies of the exclusionary rule would not be advanced by exclusion of the evidence in this case.[37]

[36]"The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice." *Stone v. Powell, supra,* 428 U.S. at 490.

[37]The Court has recognized that the problem of proportionality has serious implications for another aspect of the "imperative of judicial integrity." Just as "the courts must not commit or encourage violations of the Constitution," (*United States v. Janis, supra,* 428 U.S. at 458, n. 35), so, too, they must ensure that their decisions are rational and otherwise comprehensible. Where a decision results in application of the exclusionary rule when none

Footnote continued on next page—

—*Footnote continued from preceding page*

of the policies underlying that rule are invoked by the circumstances of the case, that decision is not comprehensible in any ordered system of priorities.

> Although the [exclusionary] rule is thought to deter unlawful police activity in part through the nurturing of respect for Fourth Amendment values, if applied indiscriminately it may well have the opposite effect of generating disrespect for the law and administration of justice. *Stone v. Powell, supra,* 428 U.S. at 691.

In a similar vein, Professor Kaplan has observed,

> [I]n actual operation, the [exclusionary] rule would seem to injure judicial integrity far more than it serves that end . . . [A]ny moral end that is served in the name of judicial integrity must be balanced against our sense of injustice not only at letting a serious criminal go free, but at letting him go free because of what may be a trivial error by the police. Kaplan, *The Limits of the Exclusionary Rule,* 26 Stan.L.Rev. 1027, 1036 n.53 (1974).

Thus, the "imperative of judicial integrity" requires, in cases such as this one, that courts refrain from applying the exclusionary rule.

Conclusion

The rather serious consequence of excluding petitioner Dunaway's voluntary statements is unwarranted in this case. He agreed to accompany the officers with little prompting and with no threats or coercion.

The manner and extent of questioning were reasonable, designed to protect all of his rights, and in conformance with the requirements of existing New York law. The intrusion into Dunaway's life was minimal and necessary in light of the dilemma faced by the police.

"[J]ustice though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." *Snyder v. Massachusetts,* 291 U.S. 97, 122 (1934) (Cardozo, J.).

The judgment below should be affirmed.

Respectfully submitted,

LAWRENCE T. KURLANDER
District Attorney of Monroe County
201 Hall of Justice
Rochester, New York 14614

Attorney for Respondent

Kenneth R. Fisher,
Jeffrey F. Chamberlain,
Melvin Bressler,
of Counsel